From: Thomas Crook
To: Microsoft ATR
Date: 1/25/02 5:51pm
Subject: Microsoft Settlement.

To: Renata B. Hesse
Antitrust Division
U.S. Department of Justice
601 D Street NW
Suite 1200
Washington, DC 20530-0001

In accordance with the Tunney act I would like to comment on the Proposed Final Judgment (PFJ: http://www.usdoj.gov/atr/cases/f9400/9495.htm) in the United States of America vs. Microsoft case. I am concerned that so many loopholes are left open in the language of the PFJ that it will be largely ineffective for its stated purpose.

My name is Thomas Crook. I am a US citizen currently living in Sydney Australia and working for a small computer software company with US, UK and Australian offices. I have been involved in the computer industry in some form since the late 1970's and have followed the rise of Microsoft almost since its inception. I have many years experience working as a software engineer and computer scientist. In addition, I have an MBA and studied marketing and economics at the doctoral level for several years. I have taught university undergraduate and masters classes in business and economics faculties at the University of Utah and the University of Sydney.

An Instance of Consumer Harm and a PFJ Loophole
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I start by relating a personal example of a specific harm to consumers arising from the Microsoft monopoly: A few years ago my University department decided that we wanted to move all our computers from Windows 95 and 98 to Windows NT. We also planned to buy some new computers. Under our University agreement with Microsoft, we purchased Windows NT licenses to cover our existing departmental computers. The agreement required us to buy licenses in multiples of five and we ended up with surplus licenses that we anticipated would be used on newly acquired machines. When the time came to purchase the new computers, we were disappointed to find that well known vendors such as Dell computer would not sell us small quantities of computers without Microsoft Windows licenses. We were forced to purchase software licenses that we would never use. From published press accounts, I subsequently understood that this was required under OEM contracts with Microsoft.

Section III G of the PFJ initially addresses the harm we suffered in

this instance, but then immediately offers a gaping loophole!

> G. Microsoft shall not enter into any agreement with:
>
> 1. any IAP, ICP, ISV, IHV or OEM that grants Consideration on the condition that such entity distributes, promotes, uses, or supports, exclusively or in a fixed percentage, any Microsoft Platform Software,
>
> >>>>>LOOPHOLE>>>>>> except that Microsoft may enter into agreements in which such an entity agrees to distribute, promote, use or support Microsoft Platform Software in a fixed percentage whenever Microsoft in good faith obtains a representation that it is commercially practicable for the entity to provide equal or greater distribution, promotion, use or support for software that competes with Microsoft Platform Software <<<<<

Based on Microsoft's past actions, I anticipate that this loophole will be used to ensure that in practice nothing will change and that ordinary consumers will not be able to purchase computers without a Microsoft operating system. (Indeed, I just did a quick online survey of major mail-order hardware vendors and could find none selling a computer without a Microsoft operating system). This loophole should be removed.

A Second Instance of Consumer Harm not Addressed by the PFJ
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Going back to my personal anecdote: the least expensive way we could purchase our new computers was to buy them with Windows 98. As soon as the new machines arrived, I installed Windows NT on them. We never used the Windows 98 license on the new machines. Further compounding our injury, I noted that the End User License Agreement that came with the Windows 98 prohibited us from using it on a different computer than the one we purchased it with. Contrast this with the case of computer hardware. If I purchased a new computer which came with a modem, and I already had a modem, no one would even think of objecting if I used the new modem on a different machine or turned around and resold it to someone else. Economic theory would argue that such restrictive licensing could only be viably exist in a very imperfect market (e.g. a monopolistic one). Indeed, at the time, given a choice, I would have gladly purchased a functionally-equivalent non-Microsoft product that had no such onerous licensing stipulations--had one existed. I note that the PFJ does not address the type of consumer harm we suffered in this instance. Consumers should not be forced to purchase software they don't need and should be free to resell software they cannot use.

Exclusion of Not-For-Profit Organizations from the Terms of the PFJ
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PBS columnist Robert X. Cringely noted that "not-for-profit organizations have no rights at all under the proposed settlement." (See

http://www.pbs.org/cringely/pulpit/pulpit20011206.html.) This is an egregious failing. Microsoft has through means fair and foul managed to eliminate the bulk of its for-profit competitors over the years. It has had a harder time dealing with not-for-profit entities. This is not for lack of trying. In the past two years Microsoft has begun to move against the open source movement, as evidenced by its spokespersons using perjoritive terms such as "viral" when referring to certain open source licenses. The PFJ must be altered such that these true competitors are not shut out.

My Agreement with Others' Comments
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(1) Codeweavers CEO Jeremy P. White (http://www.codeweavers.com/~jwhite/tunneywine.html) noted weaknesses in the PFJ that would allow Microsoft to undermine the Wine project, an important initiative in restoring competition to the personal computer operating system market.

(2) Dan Kegel noted a number of problems with the PFJ in its current form (http://www.kegel.com/remedy/remedy2.html) I agree with the points he makes.

It is my strong belief that the PFJ in its current form will be largely ineffectual and should not go forward.

Sincerely

Thomas Crook

Engineering Manager